March 12, 2021

State Bar of California Board of Trustees
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Comment on Proposed Revised State Bar Rule 4.90 Regarding Testing Accommodations

Dear Members of the California State Bar,

Disability Rights Education and Defense Fund (DREDF) and Legal Aid at Work write to comment on Proposed Revised State Bar Rule 4.90 Regarding Testing Accommodations. DREDF is a national cross-disability law and policy center that protects and advances the civil rights of people with disabilities. Legal Aid at Work is a legal services organization that ensures that people with disabilities have equal access to educational and professional opportunities. DREDF and Legal Aid at Work are committed to addressing barriers that prevent people with disabilities from entering the legal profession and represents many stakeholders who would be affected by this proposed rule. Both organizations are fully committed to an accessible bar exam for applicants with disabilities.

The proposed revisions to State Bar Rule 4.90 would create additional unnecessary barriers for applicants with disabilities, and should be rejected. The State Bar should instead adopt accepted reforms to its accommodations policies and procedures that would advance equity in the profession while reducing the time needed to process and consider accommodation requests.

These reforms include the principles implemented by the Law School Admissions Council (LSAC) pursuant to the *DFEH v. LSAC* litigation, and those stated in the U.S. Department of Justice's guidance document on testing accommodations. *See* Consent Decree in *Dep't of Fair Emp't & Hous. v. Law Sch. Admission Council*, No. 12-cv-01830-JCS (N.D. Cal. May 29, 2014), https://www.dfeh.ca.gov/legalrecords/consent-decree-in-dfeh-v-lsac/ (pdf: https://www.clearinghouse.net/chDocs/public/DR-CA-0040-0012.pdf) and Best Practices Report (N.D. Cal. Jan. 26, 2015) https://www.dfeh.ca.gov/LegalRecords/final-report-of-the-best-practices-panel/; U.S. Department of Justice, Civil Rights Division, Disability Rights Section, ADA Requirements: Testing Accommodations, https://www.ada.gov/regs2014/testing_accommodations.html.

I. The Proposed Rule Unfairly Limits the Time to Petition for Review of Denials of Accommodations.

The proposed rule would move the last day to appeal to 35 days prior to the exam, rather than the first business day of the month in which the exam is administered. This change will foreclose the possibility of appeal for those applicants who do not receive their decision denying or only partially granting their request until after the deadline.

Petitioning the California State Bar for testing accommodations is already a lengthy process. When an applicant submits a petition for accommodations, the State Bar may request further documentation up to 30 days later. Rules of the State Bar, Title 4, Div. 1, Chap. 7, R. 4.88. After the applicant secures and provides this documentation, the State Bar may take another 60 days to let the applicant know that "petition is granted, granted with modifications, denied, or action is pending." *Id.* The Bar advises applicants to submit their petitions for accommodations ***six months*** before the exam. *Id.* This is far longer than the process employed by institutions such as the LSAC.

The proposed rule change would limit the window for review by nine to thirteen calendar days compared to the window currently imposed by the State Bar rules.[1] This change would cause applicants to be at an increased risk of learning about their accommodation denials too late to appeal before the exam, particularly if the State Bar returns decisions a full sixty days after the petition is filed. An applicant may wait even longer for a review when the bar receives help from an outside consultant.[2]

Applicants denied accommodations who decide to forego taking the test have to delay their admission to the bar, at times causing professional consequences. They are not eligible for a refund of their applications fees. Rules of the State Bar, Title 4, Div. 1, Chap. 7, R. 4.81(D).

The stated concern to address the time needed to review petitions would be better addressed through the types of reforms set out in section III, *infra*. These reforms would advance equity and access to the profession instead of imposing further burdens on prospective lawyers with disabilities.

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[1] Thirty-five days before exam date July 27, 2021 is June 22, 2021, while the first business day of July 2021 is July 1, 2021 (26 days before the exam). This means the new deadline would be nine calendar days earlier than the one set by the existing rule. The February 2022 exam is expected to be administered on February 23 and 24, 2022. Thirty-five days prior to that is January 19, 2022. The first business day in February 2022 is February 1, 2022 (22 days before the exam). This means the new deadline would be 13 calendar days earlier than the one set by the existing rule.

[2] Requesting Testing Accommodations, State Bar of California, https://www.calbar.ca.gov/Admissions/Examinations/Requesting-Testing-Accommodations, ("Initial processing of a petition generally takes a minimum of 60 days from the date your application is determined complete and processing of petitions requiring review by outside consultants retained by the committee or those requiring applicants to submit additional information will most likely take longer.")

II. The Proposed Rule Would Eliminate the Ability of Applicants with Disabilities to Seek a Second Review of Accommodation Denials.

Under the current rule, applicants can seek a further review after their first appeal is denied. *See* Discussion for the Revision to Rule 4.90. The new rule would prohibit such a further review. This would foreclose the opportunity for an applicant to provide for review newly obtained supporting documentation or additional narrative.

Given the limited time frame between the submission of a petition for testing accommodations and the final deadline to request a review, the staff memo's reference to "an unending cycle of requests for review" overstates the actual burden on the committee and staff. Moreover, even if it is proper to cap the number of reviews permitted, the cap should not be one. A second review is frequently critical to applicants with disabilities.

Applicants with disabilities denied or only partially granted accommodations must request review within ten days of receiving the decision. Rules of the State Bar, Title 4, Div. 1, Chap. 7, R. 4.90(A). During this period, applicants typically work hard to gather additional supporting documentation and further explain their need for testing accommodations. At times, additional responsive documentation cannot be secured during the ten-day window. An additional, second review is appropriate and fair.

Moreover, the burden on staff and the committee would be lessened were the State Bar to embrace the reforms adopted by the LSAC subsequent to litigation conducted in the Northern District of California, together with the principles on testing contained in the guidance document of the U.S. Department of Justice. These practices would streamline the review of accommodations requests, while reducing barriers to the profession for prospective lawyers with disabilities.

III. Instead of Creating Additional Burdens on Applicants, the State Bar Should Follow Key Principles Adopted by the LSAC and Set Forth in U.S. Department of Justice Guidance – This Would Streamline the Accommodations Process and Make it More Equitable.

The proposed revision to Rule 4.90 is sought to address "the high volume of requests for review customarily received on or near the current deadline" and the need for "sufficient time for processing and consideration by the director of Admissions and the committee." This stated need as well as the rights and needs of applicants with disabilities would be better served by the State Bar following the key principles implemented by the LSAC following litigation in the Northern District of California, and stated in the U.S. Department of Justice's guidance document on testing accommodations. An inclusive approach using these accepted practices would advance equity, transparency, and efficiency, and is far preferable to creating additional barriers for applicants with disabilities seeking testing accommodations.

A. The State Bar Should Presume a Covered Disability for Any Individual Who Has Previously Been Granted Disability Accommodations on Timed Exams in Law School or on Standardized Tests for Post-Secondary Admission.

Applicants are required to demonstrate that they have a qualified disability as a threshold issue. Title 4, Div. 1, Chap. 7, R. 4.81(D). Just as Congress clarified in the ADA Amendments Act that whether "an individual's impairment is a disability under the ADA should not demand extensive analysis," Pub. L. 110–325, 122 STAT. 3553 (Sept. 25, 2008), § 2(b)(5), the analysis of whether a state bar applicant is disabled should not take much consideration. The State Bar should presume that an applicant who has previously been granted accommodations on a prior standardized test related to post-secondary admissions (LSAT, SAT I and II, ACT, GED, GRE, GMAT, DAT, and MCAT) has a disability. This is consistent with the approach taken post-litigation by the LSAC. *See DFEH v. LSAC* Consent Decree, *supra*, at Injunctive Relief § 5(c) ("When reviewing the requests identified in this Paragraph 5(c), LSAC will not re-evaluate whether the candidate has a covered disability within the meaning of the ADA.").

Further, timed exams in law school are high-stakes examinations of a similar character to the bar exam. An applicant who has navigated the difficult process of receiving accommodations with respect to timed law school exams should also be considered to be a person with a disability.

B. All Disability Accommodations Previously Granted on Standardized Tests Related to Post-Secondary Admission or on Timed Exams in Law School Should Be Automatically Granted on the Bar Exam.

Policies that grant accommodations automatically would streamline the accommodation decision process and lessen the need for review of staff decisions. When an applicant provides documentation showing that they received accommodations on a prior standardized test or on timed law school exams, the same accommodation should be granted on the Bar Exam without further inquiry.

Post litigation, LSAC presumptively approves a list of 30 common accommodations for applicants who were previously approved the same accommodations on standardized tests related to post-secondary admissions (LSAT, SAT I and II, ACT, GED, GRE, GMAT, DAT, and MCAT), including additional time up to double time. *See* LSAC's Policy on Prior Testing Accommodations, https://www.lsac.org/lsat/lsac-policy-accommodations-test-takers-disabilities/policy-prior-testing-accommodations. Under LSAC's policy, an applicant who submits their completed form with proof of the prior accommodation by the deadline is automatically granted the same accommodation. *Id.*; *accord DFEH v. LSAC* Consent Decree, *supra*, Injunctive Relief, § 5(a).

Moreover, this principle should also include accommodations granted for timed law school exams. This is consistent with the U.S. Department of Justice Guidance, which states:

> If a candidate requests the same testing accommodations he or she previously received on a similar standardized exam ***or high-stakes test***, provides proof of having received the previous testing accommodations, and certifies his or her current need for the testing accommodations due to disability, then a testing entity should generally grant the same testing accommodations for the current standardized exam or high-stakes test without requesting further documentation from the candidate.

DOJ Guidance ("What Kind Of Documentation Is Sufficient To Support A Request For Testing Accommodations?"). Timed law-school exams are "high-stakes tests" of a character similar to the bar exam.

Such a policy shift would fulfill the State Bar's goal of streamlining the existing review procedures as stated in the proposed revisions to State Bar Rule 4.90.

C. The State Bar Should Defer to Qualified Professionals Who Provide Documentation Based on Careful Consideration of the Applicant.

The State Bar requires applicants to submit documentation from qualified experts who have examined the applicant. Reports from a qualified expert with personal familiarity with an applicant should take precedence over an outside consultant who reviews the file and make a determination based solely on documentary evidence. As the Department of Justice guidance document states, "[t]esting entities should defer to documentation from a qualified professional who has made an individualized assessment of the candidate that supports the need for the requested testing accommodations." DOJ Guidance ("What Kind Of Documentation Is Sufficient To Support A Request For Testing Accommodations?").

The State Bar should initially and automatically approve applicants with documented evidence from a qualified expert who details the accommodations that best ensure an applicant's results reflect their abilities. This would streamline the existing review procedures, the stated goal of the State Bar in proposing amendments to Rule 4.90.

D. The State Bar Should Limit Their Documentation Requirements to Those that are "Reasonable," "Limited" and "Narrowly Tailored."

Under the Final Report of the Best Practices panel and as incorporated into the DOJ Guidance on testing accommodations, any documentation required of applicants must be "reasonable" and "limited" to the need for the requested testing accommodations. DOJ Guidance ("What Kind Of Documentation Is Sufficient To Support A Request For Testing Accommodations?") ("Any documentation if required by a testing entity in

support of a request for testing accommodations must be reasonable and limited to the need for the requested testing accommodations"); *see* Final Report at 2 (Documentation) ("By lessening the documentation requirements and implementing minimum standards for granting testing accommodation requests, LSAC staff can approve requests for testing accommodations on a more streamlined basis…This streamlined process is consistent with the ADA's requirement that 'the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis'"). Requests for supporting documentation should be "narrowly tailored" to determine an applicant's disability and their need for the requested testing accommodation. *Id.* By limiting documentation to only those that are truly necessary to determine the nature of the applicant's disability and their need for the requested accommodation, staff resources would be reduced while increasing equity to applicants with disabilities.

CONCLUSION

We urge you to reject the proposed changes to State Bar Rule 4.90, which would unnecessarily limit the ability of test takers with disabilities to petition denials or partial grants of testing accommodations on the state bar.

We urge you to instead implement the testing accommodation guidance from the Department of Justice, the policies and practices of LSAC following protracted litigation and negotiations, and our comments herein. These changes would simplify and streamline the accommodations process and advance the rights of applicants with disabilities seeking testing accommodations. Reforms would eliminate barriers to the profession for disabled individuals, and advance equity and inclusion.

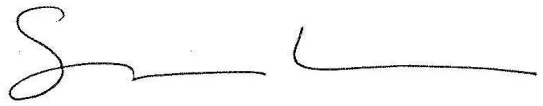
Thank you for the opportunity to comment on the proposed revisions to Rule 4.90.

Sincerely,

DISABILITY RIGHTS EDUCATION & DEFENSE FUND

Claudia Center
Legal Director

LEGAL AID AT WORK



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